1-Civil Revision Petition No.5/2005
Chunnilal ***Versus*** Gandilal & Ors.
2-Civil Revision Petition No.6/2005
Chunnilal ***Versus*** Gandilal & Ors.

Date of Order ::: 01/08/06

Hon'ble Mr. Justice Ajay Rastogi

Mr. Ashwani Chobisa, for petitioner
Mr. S.K.Jain, for respondent

At joint request, both the revision petitions arising out of common dispute about one & same suit property among self same parties, have been heard together and being disposed of by this common order.

Civil Revision Petition No.5/05 arises out of order dt.11/12/04 of ADJ No.1, Bundi dismissing misc. appeal No.16/2000 & affirming order dt. 05/04/2000 whereby Civil Judge (JD) Hindauli rejected time-barred (almost 3 years') misc. application No.10/99 filed U/O 9.R.9 CPC for re-calling order dt.15/02/99 of dismissal of suit filed by petitioner.

Whereas Civil Revision Petition No.6/05 is directed against order dt.11/12/04 of ADJ No.1, Bundi dismissing misc. appeal No.15/2000 & affirming order dt.05/04/2000 whereby Civil Judge (JD) Hindauli rejected time-barred (almost 3 years') misc. application No.3/1999 filed U/O 9.R.13 CPC for setting aside decree dt.24/05/96 and order dt.27/07/95 for proceeding ex parte against petitioner (defendant).

Re.CRP No.5/05

Facts, in brief, are that petitioner filed suit for permanent injunction claiming right of easement about 10 ft. way situated on agricultural

field Khasra No.2658 which goes to Khasra No.2662 inter-alia averring in plaint that at his agricultural land bearing Khasra No.2659 measuring 4 biswas, there is his house duly constructed and Khasra Nos. 2657 & 2658 are Siwai Chak land - in west whereof there is agricultural land on Khasra No.2662 measuring 1 bighas 3 biswas which is owned & possessed by him and for going to his agricultural land, he has been using the way situated on aforesaid Siwai Chak land for considerably long time and as such he has acquired right of easement of the way in dispute. The matter was fixed for filing of written statement on 27/07/1995 but Counsel for petitioner pleaded no instruction and accordingly suit of petitioner was dismissed for non-prosecution. On 06/03/99 petitioner filed application U/O 9 R.9 CPC seeking re-calling order dt.27/07/95 of dismissal of petitioners' suit, alongwith application U/s 5 seeking condonation of delay for which limitation U/Art.122 of Limitation Act is only 30 days.

Re.CRP No.6/05

Facts, in brief, are that civil suit for permanent injunction was filed by respondent against petitioner on 03/12/94 claiming ownership over "Bara" with boundaries given out in para 1 of plaint and over which his father had constructed a well but petitioner encroached upon parts of land on west side of bara measuring 7 x 52 ft and installed a gate and in plaint it was prayed that petitioner be evicted and pay damages @ Rs.100/- per month. Matter was fixed for filing written statement on 27/07/95 when Counsel for petitioner pleaded no instruction and proceedings were ordered to be ex parte and

ultimately suit of respondent was decreed ex parte against petitioner vide judgment & decree dt.24/05/96 and petitioner was restrained from utilizing suit land. On or about 15/01/99 petitioner filed application U/O 9 R.13 CPC, for setting aside ex parte decree (supra) alongwith application for condonation of delay of almost 3 years.

Both the applications moved (1) U/O 9 R.9, CPC and (2) U/O 9 R.13, CPC were dismissed by trial Judge vide separate order dt.05/04/2000, against which appeals were preferred by petitioner but had the same fate vide order dt.11/12/04. Hence these revision petitions.

Counsel for petitioner contends that Counsel appearing for petitioner before trial Judge never informed him about pleading no instructions in both the suits and even if lawyer has pleaded no instruction, Court was under obligation to issue notice to the petitioner apprising of statement of counsel recorded in proceedings and this fact came to his notice for first time when he appeared in Suit No.41/94 on 15/02/99 and immediately thereafter with his diligence applied for certified copy on 27/02/99 and on its availability, filed applications alongwith condonation application wherein delay was satisfactorily explained, which has been overlooked by courts below while rejecting application. In support of his submission, Counsel placed reliance on the decisions of Apex Court in ***Malkiat Singh Vs. Joginder Singh (AIR 1998 SC 258) and Ramnath Sao Vs. Gobardhan Sao (AIR 2002 SC 1201).***

Counsel for respondents on the other hand

contends that after the suit was dismissed for non-prosecution and ex parte proceedings were ordered against petitioner, petitioner appeared in another suit filed by respondent and against ex parte decree, he appeared in the Court and filed his written objections; contested contempt petition and also preferred appeal against the same and in such circumstances, it cannot be said that it was not within his knowledge of orders for proceedings and passing the decree ex parte and the plea referred to by petitioner about his knowledge of ex parte order/decree when appeared in the same Court during proceedings in another suit No.41/94 in month of January, 1999, is an after-thought for presenting applications U/O 9, Rr.9 & 13 CPC with the aid of explanation for the delay of almost 3 years by filing application U/s 5 of Limitation Act, and Courts below have examined explanation furnished by petitioner in details and recorded finding of fact holding that no satisfactory explanation of almost 3 years' delay has come forward and in absence of material and irregularity , this Court will not like to exercise powers under revisional jurisdiction U/s 115, CPC.

I have considered contentions of counsel for parties and with their assistance examined material on record. Learned trial Judge has considered entire material and recorded finding of fact that after no instruction was pleaded by Counsel appearing for petitioner before it in both the suits either of petitioner or respondent, his suit (Chunnilal Vs. Gendilal) was dismissed for non-prosecution and in another suit No.48/96 (Gendilal Vs.Chunnilal) petitioner appeared in person before the same Court

and also preferred appeal against order passed therein and in one of another suit No.41/94 (Gendilal Vs. Chunnilal), on 27/07/95 since no one appeared and filed written statement, proceedings were ordered to be ex parte and after taking evidence of respondent, ex parte decree was passed in suit filed by respondent for suit land on 24/05/96 and against which contempt petition was filed, where also petitioner appeared filed his reply to contempt petition and also preferred against that order; as such petitioner was completely aware of the orders passed by trial Court on 27/07/95 in suits preferred either by him or by respondent; and explanation furnished by petitioner seeking condonation of delay of almost 3 years was not considered to be satisfactory and accordingly dismissed his applications U/O 9 Rr.9 & 13 CPC. Facts referred to and recorded by trial Court are not disputed by petitioner. In absence whereof, in my opinion, learned trial Court has recorded the finding duly based on material on record. I do not find any illegality or material irregularity committed in passing orders impugned.

As regards judgment in ***Malkiat Singh Vs. Joginder Singh*** (supra) relied upon by Counsel for petitioner, it was a case where application for setting aside ex parte order U/O 9 R.13 CPC was considered and the fact which has come on record was that after pleading no instruction, ex parte proceedings were initiated on 08/02/92 and appellant within four months of about pleading no instruction being vigilant of his case filed application for setting aside ex parte decree and his explanation was

found to be satisfactory and bonafide and this decision in no manner applies to facts of instant case particularly when petitioner was in complete knowledge of proceedings pending in the same Court where parties were appearing for contesting their respective suit and also contested contempt petition and filed appeal too and even after almost three years, instant applications U/O 9 Rr.9 & 13 CPC with no satisfactory explanation for such inordinate delay.

As regards judgment in ***Ramnath Sao Vs. Gobardhan Sao (supra),*** it was a case where application U/O 22 R.9 CPC was filed for setting aside abatement of appeal and it was observed that legal representatives were not made aware of proceedings pending in the Court. This judgment has no bearing to facts of instant case.

Consequently both the revision petitions fail and are hereby dismissed alongwith stay application No.126/05.

(Ajay Rastogi), J.

K.Khatri/5CRP2005